(3)

Docket No. 91-7873

IN THE UNITED STATES SUPREME COURT

October Term, 1991

WILLIAM FEX,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE INTERSTATE AGREEMENT ON DETAINERS' 180 DAY PERIOD BEGINS TO RUN WHEN THE PROSECUTOR RECEIVES THE INMATE'S REQUEST OR EARLIER.

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CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

People v. Fex, 439 Mich. 117, 479 N.W.2d 625 (1992)

People v. Fex, Michigan Court of Appeals docket number 119192, released 06/21/91.

People v. Fex, Jackson County Circuit Court Number 88-49555-FC, released 03/23/89.

JURISDICTIONAL STATEMENT

Respondent concedes that this Court has jurisdiction over the issues presented in this case. Cuyler v. Adams, 449 U.S. 433, 442 (1981).

STATEMENT OF THE CASE

As petitioner's Statement is too argumentative, respondent cannot adopt it but will supply the following statement of facts.

On March 23, 1989, petitioner was convicted by a jury of armed robbery, Mich. Comp. Laws sec. 750.52, and felony firearm, Mich. Comp. Laws sec. 750.227b. Subsequently, on April 20, 1989, Jackson County Circuit Court Judge Gordon Britten sentenced him to consecutive terms of 2 and 5 to 20 years imprisonment (concurrent to the sentence that he was serving in Indiana). On June 21, 1991, however, the Michigan Court of Appeals reversed the conviction and ordered the charges dismissed. Then, on January 9, 1992, the Michigan Supreme Court summarily reversed the Michigan Court of Appeals' decision and reinstated the conviction. 439 Mich. 117, 479 N.W.2d 625 (1992).

On December 8, 1987, between 1:00 and 1:30 a.m., petitioner robbed a Rax

restaurant in Jackson with a shotgun. (Trial Transcript [Tr], pp. 48-49, 53-54). He took between $350.00 and $450.00. (Tr, p. 60).

Petitioner eventually was convicted on unrelated charges in Indiana and sentenced to serve the time in the Westville Correctional Facility in Michigan City, Indiana. Respondent placed a detainer with that facility against him for the charge in the present case. Soon afterwards, petitioner requested, on September 7, 1988, pursuant to the Interstate Agreement on Detainers, Article III, that the untried charge (in the present case) be disposed of. Respondent received the paperwork from the Indiana warden on September 26, 1988.

About ten days before trial started, petitioner filed a motion to dismiss claiming that the Interstate Agreement on Detainers had been violated. He argued that both Articles III and IV applied. He claimed that he should have been tried within 180 days of September 22, 1988, the

day that his request for final disposition was mailed by the prison to respondent. He also argued that he should have been tried within 120 days of October 26, 1988, the date that he was physically returned to Michigan. The parties argued the motion on March 22, 1989, the first day of trial. In denying the motion to dismiss, Judge Britten first ruled that the 120 day rule was not violated because Article IV does not apply because respondent had not initiated the extradition. (Tr, pp. 11-12). He then stated:

> The Court is quite satisfied that the time is triggered by receipt of the notice by the prosecutor otherwise you'd have no way of knowing that the matter was in process and he could be denying the People of their rights to prosecution without ever being aware that the matter was received, so it makes sense to us that date to start our time

> running here leaves 182 [sic] days court file reflects to today. We have a delay of seven days because the transcript would not be ready for the arraignment in Circuit Court and that seven-day delay was not the fault of the prosecutor nor the defendant but because the reporter was not able to get the transcript out in one week so that was a seven-day delay there which would take away from 182 [sic] and leave us with 175 [sic] days.
>
> * * *
>
> I see my first mistake. I started off with nine days in September and that would not be correct. It's an error. We're under 177 days to today. Thank you. (Tr, pp. 12-13).

The Michigan Court of Appeals, however, on June 21, 1991, disagreed:

> Michigan case law is clear and the commencement of the 180-day

statutory period was triggered by the defendant's request for final disposition to the prison officials in this case. People v Malone, 177 Mich App 393, 399; 442 NW2d 658 (1989); People v Marshall, 170 Mich App 269, 276-277; 428 NW2d 39 (1988). Since the charges against defendant were not brought to trial within the requisite 180-days, and noting that no exceptions to the statutory requirement are claimed, dismissal of the charges against defendant is mandated. People v Joseph Bowman, ___ Mich App ___; ___ NW2d ___ (Docket No. 69453, decided May 7, 1991, 9:35 a.m.).

Then, however, on January 9, 1992, the Michigan Supreme Court summarily reversed the Michigan Court of Appeals' judgment and reinstated the conviction:

> In light of all these considerations, we are persuaded that the majority rule should be adopted in Michigan. We thus conclude that the Court of Appeals erred when it found that the defendant was no tried within the 180 day period stated in Article III(a) of the IAD. 439 Mich. 123-124.

Five Justices signed the majority opinion. The two Justices who dissented did so claiming: "Peremptory disposition is not appropriate." 439 Mich. 124.

ARGUMENT

BECAUSE PETITIONER WENT TO TRIAL WITHIN 180 DAYS AFTER RESPONDENT RECEIVED HIS REQUEST UNDER THE INTERSTATE AGREEMENT ON DETAINERS, HIS CONVICTION SHOULD NOT BE DISMISSED.

Although a number of reasons do in fact exist why this Court might want to grant certiorari in this case, respondent asks that it does not. The Michigan Supreme Court correctly analyzed the issues and properly rejected each of petitioner's arguments. In the present case, Article III's 180 day period began on September 26, 1988, when respondent received petitioner's request for speedy disposition. This Court has already said so, the Congressional history says so also, and the vast majority of jurisdictions in the country says so too. Further, because petitioner is trying to litigate facts not litigated in the trial court, this may not be the best case

anyway to address these issues.

To a certain extent, this case is directly controlled by this Court's language in Carchman v. Nash, 473 U.S. 716, 721 (1985), where this Court stated that the period in fact starts when the prosecutor receives the request:

> Specifically, Article III required the warden to inform the prisoner that a detainer has been lodged against him and that he may request final disposition of the indictment, information, or complaints upon which the detainer is based. If the prisoner makes such a request, the warden must forward it, along with a certificate providing certain information about the prisoner's terms of confinement, to the appropriate prosecuting official and court of the receiving State. The authorities in the receiving State then must bring the prisoner

to trial within 180 days absent good cause shown or the court must dismiss the indictment, information, or complaint with prejudice and the detainer will cease to be of any force or effect. (Emphasis added.)

Carchman is completely consistent with the legislative history. Senate Report No. 91-1356, 91st Congress, 2d Session, 3 U.S. Code Congressional & Administrative News, p. 4865 (1970), states:

> Under the agreement, prison authorities are required to inform prisoners of all indictments, informations, or complaints on the basis of which detainers have been lodged against them by other jurisdictions. Prisoners may then request trial on such pending charges. Any request is transmitted through the warden to the proper official in the other jurisdiction who then has 180 days to bring the prisoner to trial. (Emphasis added.)

This conclusion is further buttressed by the Deputy Attorney General's letter to Congress concerning the IAD which is found on page 4868 of the same Congressional Administrative News Report:

> Article III of the Agreement provides that the inmate may make a request for the disposition of all pending charges upon which detainers are based by applying to the officials in whose custody he is placed, and that application will be forwarded to authorities of the jurisdiction in which charges are pending. The person must be brought to trial within 180 days thereafter.

In fact, the vast majority of jurisdictions in this country have interpreted the 180 day period of Article III of the IAD as starting when the prosecutor received the request and not

when the defendant makes the request. In State v. Braswell, 194 Conn. 297, 481 A.2d 413, 417 (1984), cert. denied 469 U.S. 1112 (1985), the Connecticut Supreme Court ruled:

> Given the IAD's use of the word "sent" in subsection (b), we must presume that its use of the word "deliberate" in subsection (a) signifies its recognition of different meanings commonly attributed to each word. * * * It follows that had the IAD intended the 180 days disposition period to commence when the prison placed his or her request with the custodial officials, subsection (a) like subsection (b), would refer to the date on which the prison requests to be sent, rather than the day on which it was caused to be delivered.

Further, as stated in Young v. Mabry, 471 F. Supp. 553, 561 (E.D.Ark.1979), affd.

596 F.2d 339 (8th Cir. 1979), cert. denied 444 U.S. 853 (1979):

> The Court is satisfied that the plain language of Article III * * * leads to the conclusion that the date of the receipt of notice by the prosecuting authorities triggers the statutory period. The key word in the statutory language is "delivered" and comporting with the purpose of the notice provision, the term would have little meaning if something other than the receipt of the notice were contemplated.

Likewise, as ruled by the New Jersey Superior Court in State v. Ternaku, 156 N.J. Super. 30, 383 A.2d 437, 439 (1978):

> The language of the statute is explicit. It provides for the commencement of the 180-day period when defendant has "caused to be delivered to the prosecuting officer and the appropriate court"

the written notice and request for final disposition of the pending indictment. The Legislature clearly intended that the documents be delivered to the prosecutor and the appropriate court and the 180-day period starts to run. The period does not start to run upon mere execution and delivery of the notice and request to the warden, commissioner of corrections or other person, having custody of defendant. In our view, it would be contrary to the public interest to start the running of the 180-day period prior to actual receipt of the notice and request by the prosecutor and the court. If we were to interpret the statute as defendant requests, an indictment would be subject to dismissal each time delivery of the documents to the prosecutor

and court is delayed regardless of cause. We cannot conceive our Legislature as intending such a result by enacting the Interstate Agreement on Detainers. As a matter of fact, if the Legislature intended the 180-day period to begin from the time the defendant delivers the notice to the warden, commissioner of corrections or other official having custody over him, it would have so signified by appropriate language.

Many other cases as well have ruled (or at least have stated) that the trigger date for the 180-day period is the date that the prosecutor receives the request from the warden and not the date that the inmate gives the request to the warden. Among these cases are: United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir. 1988), cert. denied 488 U.S. 1015 (1989); Casper v. Ryan, 822 F.2d 1283, 1291 (3rd Cir. 1987), cert. denied 484 U.S. 1012

(1988); Browning v. Foltz, 837 F.2d 276, 283 (6th Cir. 1988), cert. denied 488 US 1018 (1989); United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), cert. denied 419 U.S. 965 (1974); Beebe v. Vaughn, 430 F. Supp. 1220 (D.Del. 1977); Soffield v. State, 521 So.2d 1368, 1370 (Ala.Crim.App. 1987); Spears v. State, 280 Ark. 577, 660 S.W.2d 913 (1983); People v. Wilson, 69 Cal.App.3d 631, 138 Cal.Rptr. 259 (1977); People v. Bielecki, 41 Colo.App. 256, 588 P.2d 377, 378 (1978); State v. Minnick, 413 So.2d 168, 169 (Fla.App. 1982); Thompson v. State, 186 Ga.App. 379, 367 S.E.2d 247, 249 (1988); Holland v. State, 265 Ind. 216, 352 N.E.2d 752, 757 (1976); State v. White, 234 Kan. 340, 673 P.2d 1106, 1110 (1983); Hines v. State, 58 Md.App. 637, 473 A.2d 1335, 1341 (1984); State v. Walton, 734 S.W.2d 502, 504 (Mo. 1987); State v. Grant, 227 Mont. 181, 738 P.2d 106, 110 (1987); People v. Vrlaku, 73 N.Y.2d 800, 537 N.Y.S.2d 24, 533 N.E.2d 1053, 1054 (1988); State v. Reitz, 26 Ohio App.3d 1, 26 Ohio

Br. 168, 498 N.E.2d 163, 164 (1984); State v. Arwood, 46 Or. App. 653, 612 P.2d 763, 764 (1980); Commonwealth v. Fisher, 451 Pa. 102, 301 A.2d 605, 606 (1973); State v. Default, 540 A.2d 355, 356 (R.I. 1988); State v. Moore, 774 S.W.2d 590, 595 (Tenn. 1989).

As noted above, on the other hand, the Michigan Court of Appeals completely ignored all of these cases. Yet, these cases constitute the majority view. Anno: Validity, Construction, and Application of Interstate Agreement on Detainers, 98 A.L.R.3d 160, 208.

The Michigan Supreme Court on the other hand, noted each of these points in summarily rejecting petitioner's claims. It first looked at the actual language of the statute itself:

> In Article III(b) the IAD states a prisoner's duty to give or send the request to the prison authorities who are holding him. Similar language, which would

> indicate that the 180-day period runs from the date the request is given or sent to prison authorities, could easily have been employed in Article III(a), if the drafters had been so inclined. Instead, the period runs from the time when the prisoner has caused <u>delivery</u>, which is actual receipt. 439 Mich. 120.

Then, it quoted from this Court's language in <u>Carchman</u>, <u>supra</u>, 473 U.S. 721. 439 Mich. 120. Then, it quoted from the United States Senate Judiciary Committee's report. 439 Mich. 121. Last, it quoted <u>Moore</u>, <u>supra</u>, 774 S.W.2d 595 in noting that the vast majority of jurisdictions has interpreted the IAD this way. 439 Mich. 121-122. It even stated:

> An obvious purpose of an interstate agreement is to achieve a uniform body of law in the jurisdictions that have enacted

> the agreement. Absent sound reasons to the contrary, it is therefore sensible to interpret such an agreement in the same manner as a majority of other jurisdictions. 439 Mich. 121, fn. 5.

On the other hand, in reality, petitioner does not explain why the 180-day period should begin earlier. He cites to neither the statute's language nor to any policy reason why the Michigan Supreme Court may have misinterpreted this interstate compact. Instead, to a very large extent, he is trying to turn this Court into a fact finding court. As he knows, the IAD is not triggered until a detainer has been filed. <u>United States v. Mauro</u>, 436 U.S. 340 (1978). Accordingly, he tries to argue that a detainer was filed against him in the Indiana prison long before the prison authorities gave him his papers. Other than his own speculation, however, he points to absolutely nothing in

the record to back up this factual assertion. Respondent, on the other hand, has consistently denied this factual assertion. As it was, petitioner did not even try to litigate this issue properly in the Michigan courts. He made no such assertion whatsoever at the trial level, instead relying almost exclusively on his claim that the IAD begins the date that the prison authority mails to the prosecutor the Article III request. Not until the appeal did he start making these particular factual arguments. At no time has he has ever presented any evidence whatsoever to back up these factual claims. Yet, a criminal defendant has the burden of proving an IAD violation. Seymour v. Alabama, 846 F.2d 1355 (11th Cir. 1988). Petitioner has not in the least proven that respondent sent a detainer earlier. This Court should not now become a fact finding court. To do so would violate federal/state comity.

In any event, respondent was in the

Fort Wayne jail in Indiana for some of the time before petitioner sent the detainer. The IAD does not apply if the inmate is incarcerated in a jail awaiting sentence as opposed to a prison after sentence. United States v. Glasgow, 790 F.2d 446, 448 (6th Cir. 1985) cert. denied 475 U.S. 1124 (1986); United States v. Roberts, 548 F.2d 665, 671 (6th Cir. 1977), cert. denied 431 U.S. 931 (1977).

Respondent's other argument, that the Indiana authorities took too long in forwarding the request to the prosecutor, is also without merit. He cites absolutely nothing to support his claim that, at most, a few days delay should somehow change the date that the 180-day period should start. In fact, he is being unreasonable. The prison must do a number of things once it receives an inmate's request. It must make up a certificate which tells the requesting prosecutor the terms of the inmate's present commitment, the time that he has served, the time that he has left

remaining, the amount of good time, his parole eligibility, and the State's decisions on parole. He must then send to the prosecutor a written notice and a certificate. As it was, petitioner was certainly not the only inmate in the Indiana Westville Correctional Facility at the time. Under the circumstances, 15 days is reasonable.

In any event, whether 15 days is reasonable or not is really a factual determination. Once again, petitioner has never even requested any kind of an evidentiary hearing on this point. Once again, his request that this Court become a fact finding court would violate federal/state comity.

In any event, petitioner's argument on this point would make the IAD very difficult to administer. Once a prosecutor receives the Article III request, he must schedule everything to ensure that trial begins within the 180-day period. Under petitioner's interpretation, however, the

prosecuting attorney would never really know for sure just when this period begins. How does the prosecutor ever know that the sending prison took too much time in dealing with the paper work? The Michigan Supreme Court's interpretation far better promotes efficiency. Petitioner's interpretation would lead to a windfall for criminal defendants.

On the other hand, respondent does concede that this Court may wish to grant certiorari in this case. As petitioner points out, a split in the jurisdictions presently exists on this issue (though the vast majority supports the Michigan Supreme Court). This Court may wish to resolve that split. Further, unlike most federal questions, this is petitioner's last chance to have this issue reviewed. At least in the Sixth Circuit, IAD claims are not cognizable under 28 U.S.C. sec. 2254. Browning, supra.

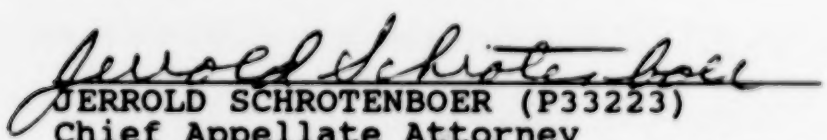
Yet, despite these considerations, respondent asks this Court to deny this

petition. The Michigan Supreme Court's decision is too obviously correct. Further, petitioner is relying too much on facts not on the record.

Last, at the very least, should this Court in fact reverse, a discharge is not necessarily proper (at least yet). Respondent raised a waiver issue in the Michigan Supreme Court which was never addressed. By never demanding to be tried within 180 days, petitioner waived the IAD speedy trial provision. Williams v. State, 533 N.E.2d 1193 (Ind. 1989). If this Court should reverse, the proper procedure would be to remand back to the Michigan Supreme Court to consider the remaining issue.

WHEREFORE, respondent asks this Court to deny this petition for a writ of certiorari.

Respectfully submitted,



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